STATE OF MICHIGAN
IN THE MICHIGAN SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff,

-v-

KENDRICK SCOTT,
Defendant.

Supreme Court No. _____
Court of Appeals No. 317915
Trial Court No. 99-005393-01

DEFENDANT KENDRICK SCOTT'S APPLICATION FOR LEAVE TO APPEAL AFTER REMAND

(Filed Concurrently with the Application in Companion Case, *People v Justly Johnson*, Court of Appeals No. 311625)

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JUDGMENT APPEALED FROM, GROUNDS FOR RELIEF, AND RELIEF SOUGHT

Defendant-Appellant Kendrick Scott appeals from the May 31, 2016, Court of Appeals Opinion affirming the trial court's order denying his Motion for Relief from Judgment, *People v Scott* (No. 317915) (May 31, 2016), Appendix A, after remand from this Court for an evidentiary hearing. Michigan Supreme Court Remand Orders, Appendix B.

This Court should summarily reverse the decision below, or grant this Application for Leave to Appeal because:

1. **The Court of Appeals clearly erred in its approach to evaluating materiality under the fourth prong of the test set forth in *People v Cress*, 468 Mich 678; 664 NW2d 174 (2003), by evaluating just one piece of new evidence in a vacuum**. In laying out the *Cress* standard, this Court took a holistic approach to evaluating materiality, considering together all evidence, old and new, to determine if a different outcome is reasonably probable. *Id.* at 692. In *People v Grissom*, this Court again applied the materiality prong of the *Cress* test holistically. 492 Mich 296, 311; 821 NW2d 50 (2012). The Court of Appeals in this case, however, considered only one piece of new evidence, the account of eyewitness Charmous Skinner Jr. ("CJ"), in isolation. This is not appropriate analysis under *Cress*: The *Cress* test inherently involves weighing the new evidence against the old—only then can a court appropriately determine whether the new evidence is of sufficient materiality to warrant a new trial.

Mr. Scott's and codefendant Justly Johnson's cases present an obvious example of the manifest injustice caused by the Court of Appeals's flawed approach to evaluating *Cress* materiality. MCR 7.305(B)(5)(a). The only pieces of evidence at trial were the second-hand accounts of two young men who were told that they would be charged with the murder if they did not implicate someone. **Much of their inculpatory testimony has been proven to be impossible by independently verifiable facts**, and all of the inculpatory testimony has been

recanted. Other evidence that has emerged since trial convinced even the trial court that the victim's husband was likely behind the murder. Weighed against that background, the account of CJ Skinner obviously creates a reasonable probability of a different outcome. **CJ is the victim's own son and the only eyewitness ever presented in this case, and he testified under oath that neither Mr. Scott nor Mr. Johnson are the perpetrator.**

The issue implicates a question of major significance to our State's jurisprudence. MCR 7.305(B)(3). And, as mentioned, the Court of Appeals's clearly erroneous analysis results in a manifest injustice in this case—namely the denial of a new trial to two men who have presented compelling evidence of innocence. MCR 7.305(B)(5)(a); *see also* MCR 7.205(B)(2) (the issue is of significant public interest).

2. <u>The Court of Appeals clearly erred in concluding that the scope of the remand did not cover the domestic violence records and the recantations, and that erroneous decision causes manifest injustice in this case.</u> MCR 7.305(B)(5)(a). This Court's Remand Orders, read as a whole, only make sense if they are read to include the domestic violence records and recantations. In Mr. Johnson's Remand Order (Appendix B), this Court included a fourth point that was not part of Mr. Scott's Remand Order:

> . . . (4) if the court determines that the defendant is not entitled to relief, but that the defendant in *People v Kendrick Scott* (Docket No. 148324) is entitled to relief, the Court of Appeals shall determine whether the defendant would have been entitled to relief but for MCR 6.508(D)(2), and, if so, whether, in the court's judgment, the denial of such relief in that circumstance violates the defendant's constitutional right to due process under either the federal or state constitutions.

That language cannot simply be ignored, and its meaning is quite clear: There were certain issues to be considered on remand that were never previously presented by Mr. Scott, but were previously presented by Mr. Johnson (therefore implicating MCR 6.508(D)(2)). **The only such issues are the recantations of the State's only two inculpatory witnesses and the domestic violence records.** Therefore, those two issues must fall within the scope of this Court's

Remand Order. The trial court was thus required to build a record on the recantations and the domestic violence records, and take their weight into account in making its decision.

Taking that evidence into account, the trial court concluded that there was no attempted robbery, but rather that the murder here was a planned killing orchestrated by the victim's husband. **That being the case, Mr. Scott's and Mr. Johnson's convictions, based solely on a robbery/felony murder theory, must be reversed.**

Moreover, even if this Court decides that the recantations and domestic violence records were not within the scope of its November 2014 remand, this Court can and should now expand the scope and consider that evidence. *See* MCR 7.316(3) and MCR 7.316(7). Such expansion of the remand would implicate no additional judicial resources, as the trial court has already built a record on the domestic violence records and the recantations. Either way, this Court should not ignore evidence that makes clear that two innocent men have been incarcerated for over 16 years for a murder they did not commit. MCR 7.305(B)(2).

3. **The Court of Appeals also clearly erred in holding that trial counsel in this case could not have been expected to find and interview CJ Skinner, a witness they would have known from the police reports to have been in the car when his mother was shot.** If it is true that trial counsel need not even seek to investigate a *known* eyewitness—even where the State's case features no eyewitnesses, and an eyewitness in the defense's favor would clearly carry weight—then the "reasonable investigations" requirement of *Strickland v Washington* would be greatly undermined. The standard for ineffective assistance of counsel is of major significance to the State's jurisprudence. MCR 7.305(B)(3). The Court of Appeals decision eviscerates the longstanding requirement that counsel conduct reasonable investigations, and thus that decision was clearly erroneous and will cause material injustice. MCR 7.305(B)(5)(a).

4. **Finally, Mr. Scott and Mr. Johnson present strong evidence of actual innocence, and this Court should not allow their wrongful convictions to stand.** It should either summarily reverse the decision below and order a new trial, or grant leave to appeal to lay out the proper standard for defendants presenting strong actual innocence claims in procedurally complicated cases. This Court has previously sought to address this issue in *People v Garrett*, 493 Mich 949; 828 NW2d 26 (2013), and *People v Swain*, -- Mich --; 869 NW2d 618 (2015), but it was unable to decide the issue in those cases.

Indeed, the prior remand order in Mr. Johnson's case—questioning whether his due process rights would be violated if procedural rules prevented the court from considering claims demonstrating his innocence, *see* November 2014 Remand Order—also made clear that this Court recognized Mr. Scott's and Mr. Johnson's cases as implicating the same issues as *Garrett* and *Swain*. Mr. Scott's and Mr. Johnson's cases now present this Court with an excellent opportunity to reach those issues, which are of great public interest, MCR 7.205(B)(2), and involve questions of major significance to our State's jurisprudence, MCR 7.305(B)(3).

STATEMENT OF JURISDICTION

This Court has jurisdiction over this application for leave to appeal pursuant to MCR 7.303(B)(1). This Application is timely under MCR 7.305(C)(2)(a) because it is filed within 56 days of May 31, 2016, the date of the Michigan Court of Appeals opinion affirming the trial court's denial of the motion for relief from judgment.

STATEMENT OF QUESTIONS INVOLVED

I. Is the materiality prong of the *Cress* new evidence test to be applied holistically, as this Court applied it in *Cress* and *Grissom*, and if so, did the Court of Appeals majority clearly err in this case by evaluating the materiality of only one piece of new evidence, while failing entirely to address the strengths and weaknesses of the other evidence in the record?

The Court of Appeals answered, "No."

The Defendant-Appellant answers, "Yes."

II. Are the domestic violence records and recantations in this case beyond the scope of this Court's prior remand, even though the trial court built a record pertaining to that evidence and found itself convinced that attempted robbery/felony murder—the only theory of guilt ever presented to the factfinder—could no longer be sustained?

The Court of Appeals answered, "Yes."

The Defendant-Appellant answers, "No."

III. Did the Court of Appeals clearly err in holding that trial and appellate counsel need not even seek to interview a *known* eyewitness—the only eyewitness to ever be presented in this case—who would have given an entirely exculpatory account?

The Court of Appeals answered, "No."

The Defendant-Appellant answers, "Yes.

IV. In a case where the victim's own son, the only eyewitness ever presented, has definitively exculpated Mr. Scott and Mr. Johnson, while much of the original inculpatory testimony has been shown to be impossible, should this Court grant relief under MCL 770.1, MCR 7.316(A)(7) and/or a freestanding actual innocence standard?

The Court of Appeals did not answer.

The Defendant-Appellant answers, "Yes."

BRIEF STATEMENT OF THE CASE

This is a case where a new eyewitness, who saw his own mother's murder, has now testified under oath that he is absolutely sure that the perpetrator was neither Kendrick Scott nor co-defendant, Justly Johnson. No eyewitness was ever before presented in this case: The prosecution's case consisted only of wavering hearsay accounts from two young men who were themselves in custody and threatened with prosecution for the murder in question. The accounts these men gave have not only been recanted, but have actually been shown to be verifiably false. Moreover, evidence has emerged that the victim's husband had a history of serious domestic violence against her, and even the judge presiding over the remand hearing was convinced that the evidence in this case simply does not support a theory of attempted robbery/felony murder. **Judge Kurtis Wilder of the Court of Appeals indicated that he would have peremptorily reversed the trial court** and remanded for a new trial. Peremptory Reversal Order, Appendix A.

The courts below abused their discretion in denying relief in this case. Mr. Scott and Mr. Johnson were only convicted under an attempted robbery/felony murder theory. Indeed, the prosecutor at trial affirmatively argued against a finding of intent to kill. Thus, if a judge finds (as the trial judge found here) that the record of this case no longer supports an attempted robbery, the judge must grant relief from judgment.

The Court of Appeals clearly erred in failing to evaluate the full record of this case in deciding whether there would be a reasonable probability of a different outcome in light of the new evidence. The court did not comment on the inculpatory evidence or address the fact that much of it has been shown to be impossible. Indeed, when the full record of this case is considered, it is clear that Mr. Scott and Mr. Johnson are innocent men who have spent 16 years in prison for a crime they did not commit. This Court should thus either summarily reverse and order a new trial or grant leave to appeal to address the important questions presented.

STATEMENT OF FACTS

a. *CRIME*

This case stems from the May 9, 1999, murder of Lisa Kindred in the presence of her three children, including 8-year-old Charmous Skinner, Jr. ("CJ").

Earlier that night (the evening of May 8), Lisa, her children and her husband, Will Kindred, had gone to a drive-in movie in Dearborn. Tr. 5/31/00 at 24, 54, 102. On the way home, Will suddenly announced that, instead of going straight home to Roseville, they would make a stop on Detroit's East Side to talk to a relative. *Id.* at 24-25, 31-32. Even though it was very late at night, Will claimed he was making the unannounced trip in order to discuss purchasing a motorcycle from his sister's boyfriend, Verlin Miller. *Id.* at 25, 31.

Upon arriving, Lisa parked the van outside Will's relatives' house on Bewick Street and Will went inside. Tr. 5/31/00 at 31-33. She waited outside in the car on the deserted street with three children (including a newborn). *Id.* at 13. At one point, Lisa went to the door of the house and asked Will to come back to the car. *Id.* at 33. Will told her that he would be out shortly. *Id.* Soon afterward, he heard a noise, like a car door slamming, and went to the front door just in time to see Lisa's van speeding away. *Id.* at 33-35. Will did not pursue the fleeing car containing his wife and children, but instead chased an unknown person on foot through a field, failing to catch him. *Id.* at 33-39. Shortly thereafter, Lisa's van stopped at a nearby gas station, and she staggered out and collapsed. *Id.* at 14-15, 102. She had a single gunshot wound from a .22 caliber weapon, *Id.* at 54 and Tr. 6/1/00 at 34, and she died shortly afterward. Tr. 5/31/00 at 15.

b. *INVESTIGATION AND TRIAL*

In the immediate aftermath, police released a statement indicating that there "was a strong possibility that Kindred knew her assailant" and stressing that "she was not involved in a carjacking." M.L. Elrick, *et al.*, *Mom Is Shot, Saves Her Children, Dies*, DETROIT FREE PRESS,

May 10, 1999. Nevertheless, the investigation and prosecution did not focus on Will Kindred. Although he had a long and significant history of domestic violence against the victim, and police had confiscated .22 caliber weapons from him in the past (see evidentiary hearing facts below), none of this information about Will's background came out at trial.

Instead, the case centered on two people arrested near the scene, Antonio Burnette and Raymond Jackson. Both were very intoxicated on alcohol, illegal narcotics and/or prescription medications on the night of the murder. Prelim. Exam 5/26/99 at 66, 73-74, 76; PE 6/4/99 at 33, 51-52; TT 5/31/00 at 91, 149-51; Co-Def Tr. 1/11/00 at 39-40, 92-93, 106.[1] And both asserted that they were questioned aggressively by the police and made to fear that they would themselves be charged with the murder if they did not implicate someone. PE 5/26/99 at 68-69, 77-78; PE 6/4/99 at 43-45; TT 5/31/00 at 155-56; Co-Def Tr. 1/11/00 at 41, 96-97, 115.

The accounts of Burnette and Jackson were the only evidence that implicated either Mr. Scott or Mr. Johnson. Neither witness actually saw the crime, but they testified to statements Mr. Scott and Mr. Johnson allegedly made and to events they supposedly witnessed after the crime.

Burnette stated that both defendants spoke with him in the hours after the crime and confessed to attempting to rob the victim before shooting her. TT 5/31/00 at 88, 143, 146; Co-Def Tr. 1/11/00 at 14-16, 58. He asserted that this conversation began around 2:30 a.m. and went until 4:30 a.m. PE 5/26/99 31, 47, 77; Tr. 5/31/00 at 90, 145; Co-Def Tr. 1/11/00 at 12, 54. He also stated that he saw both defendants pass guns to their girlfriends, claiming to have seen Mr. Johnson do so the night of the murder, and Mr. Scott the morning after at about 7:00 or 8:00 a.m. PE 5/26/99 at 56, 62; Co-Def Tr. 1/11/00 at 30-31; 43-44, 51-52, 55.

[1] Mr. Johnson and Mr. Scott were tried separately. Mr. Johnson had a bench trial before Judge Prentis Edwards in January 2000, and Mr. Scott had a jury trial before Judge Edwards in May 2000. The inculpatory evidence against both defendants was the same: The hearsay accounts of Burnette and Jackson. Citations to the co-defendant's transcript are included where they help establish consistency or contradiction.

Jackson testified that Mr. Johnson had told him he had "hit a lick" and messed up and "had to shoot." Tr. 5/31/00 at 137-38. At the time of his testimony, Jackson was staying at a hospital for "mental difficulties," PE 5/26/99 at 5-6, and was taking many medications for his mental condition. PE 6/4/99 at 10, 30, 33. He admitted that he heard voices that were not real and had trouble distinguishing the real from the imagined. Co-Def Tr. 1/11/00 at 87, 96, 120-21.

c. *CONVICTION, APPEALS AND REMAND FOR HEARING*

Mr. Scott was tried and convicted at a jury trial before Judge Prentis Edwards in January 2000. After the conclusion of direct appeals Mr. Scott filed this, his first and only, motion for relief from judgment in 2013. After Judge James Callahan denied the motion without a hearing and the Court of Appeals denied leave to appeal, this Court remanded this case, along with Mr. Johnson's case, for an evidentiary hearing on November 21, 2014. *People v Scott*, 497 Mich 897, 855 NW2d 750 (2014).

Mr. Scott and Mr. Johnson filed a motion seeking the recusal of Judge Callahan for the hearing on remand. They argued that Judge Callahan—who had denied Mr. Scott's 2013 motion for relief from judgment without a hearing—had already prejudged the credibility of CJ Skinner. Thus, the issues on remand, which called on the factfinder to judge anew Skinner's credibility, should be decided by a new judge. The recusal motion was denied. Tr. 1/29/15 at 10. The joint evidentiary hearing was held before Judge Callahan on April 8; April 15; May 15; and May 27, 2015, and the judge denied relief from judgment on August 7, 2015. Tr. 8/7/15 at 12-24.

d. *WITNESSES AT THE 2015 EVIDENTIARY HEARING*

Charmous Skinner, Jr., ("CJ"), Lisa Kindred's son, was born on September 24, 1990 (making him 8 years and 8 months old when his mother died). Evid. Hearing Tr. 5/15/15 at 7. CJ was close to his mother, and he lived with her his whole life until her death. *Id.* at 8. He lived in Michigan from the time he was 3 until his mother died. *Id.* at 7. At the time she was killed, CJ

lived with his mother, her husband Will, and two younger children in Roseville. *Id. at* 7, 44.

CJ recalled that his mother's murder occurred in the early morning hours (just after midnight) on Mother's Day. EH 5/15/15 at 9. He and his family had gone to a drive-in movie earlier that night, and then they made a stop in Will's family's neighborhood on the way home. *Id.* at 9. CJ recalled that his mother was driving, which is consistent with Will's testimony from trial. *Id*; Co-Def Tr. 1/10/00 at 22. Upon arrival, Will got out of the car and went into a house, while Lisa and the children waited in the car. EH 5/15/15 at 10. CJ was initially in one of the back seats of the minivan, but he moved to the front passenger seat after Will left. *Id.*

As they waited in the car for Will to return, CJ noticed that his mother was agitated and impatient. *Id*. at 10-11. At one point she left the car, walked up to the house, and knocked on the door. *Id.* at 11. There was a brief conversation at the door, and then his mother returned to the car. *Id.* CJ's recollection is corroborated by the testimony of Will Kindred and Verlin Miller. *E.g.* PE 5/26/99 at 13-14; Tr. 5/31/00 at 25-27, 57-58; Co-Def Tr. 1/10/00 at 15-16, 35, 41-42.

As his mother returned to the van, opened the door, and began to climb inside, CJ saw a man behind her. EH 5/15/15 at 12. He affirmed that he saw the man's face well enough to give a description and is "positive [he could] identify him." *Id*. at 12-13, 41. CJ described the man as African-American, mid-30s, with very short hair, a beard, and a big nose. *Id.* at 12. His gaze was drawn to the man's face, which was visible due to the car light turning on as his mother opened the door. *Id*. at 13, 41. CJ noted that the man was behind his mother and off to the side. *Id*. at 28.[2]

At this point, CJ noticed no other people in the street; the man was alone. *Id.* at 13-14. No words were spoken between the man and CJ's mother, and the man did not attempt to take anything from her or the van. *Id.* at 14, 63. With the man "damn near," "maybe six inches"

[2] CJ drew a diagram at the hearing, which shows his mother getting in the driver's side of the car with the car door open and a man behind his mother off to the side. Ex. 7 at Evidentiary Hearing, Appendix C.

behind his mother, with the door in between her and the man as she climbed back in the van, CJ heard a loud bang, and the driver's side window shattered. *Id.* at 14, 28-30, 57. After the bang, his "mother got in the car and raced off to the nearest gas station, got out, fell out, and died." *Id.* at 15. CJ recalled hearing just one gunshot, *Id.* at 71, which corresponds with the medical examiner's opinion that his mother was shot one time, and likely through glass, which resulted in other minor wounds in addition to the one gunshot. PE 5/26/99 at 9–10.

CJ recalled that, at the gas station, his mother got out of the car, took ice out of the cooler they had in the van, and then collapsed. EH 5/15/15 at 15, 65. At that point, he retreated to the back of the van and began screaming and crying with his siblings. *Id.* at 15, 67. He recalled the police and an ambulance arriving shortly afterward. *Id.* at 15, 66. He was taken to Will's mother's house later in the night. *Id.* at 66. The next morning, CJ woke up and looked for his mother, only to be told by Will's mother that she was dead. *Id.* at 15-16.

CJ went to his mother's funeral, and he presented the Mother's Day card he had made for her at school. *Id.* at 16. Sometime after the funeral, CJ moved to Pennsylvania to live with the family of his biological father. *Id.* at 16, 68.

CJ was not interviewed by any police officers or lawyers in the aftermath of his mother's death. *Id.* at 16. His family in Michigan also never asked him about the event. *Id.* CJ made clear, however, that he would have cooperated if the police had questioned him about what he had seen or asked him to identify the shooter from a lineup. *Id.* at 17, 38. CJ indicated that he did not want to talk about the event with his family in the years that followed, but he is very interested in seeing his mother's killer punished. *Id.* at 17, 38. Because they did not reach out to him, CJ assumed that the police "had everything handled, everything figured out," and he did not think they needed his help to solve the case. *Id.* at 18.

Years later, in August 2011, CJ received a letter inquiring about his mother's murder

from investigative reporter Scott Lewis. *Id.* at 18. He wrote back, indicating that he had seen the man who shot his mother and felt confident he could identify him, and he offered to look at a photo lineup. *Id.* at 19-20. CJ's letter to Lewis concluded with: "I will never forget the person's face, and if it is him, I will testify against him. But if it's not, I would not mind testifying on his behalf." *Id.* at 20. CJ then spoke on the phone with Lewis and discussed what he saw on the night of his mother's death, giving Lewis a description of the shooter. *Id.* at 20. Lewis was the first person to whom CJ revealed his firsthand account of the shooting. *Id.*

After speaking with Lewis, CJ was contacted by the Michigan Innocence Clinic. *Id.* at 23. He spoke with law students from the MIC over the phone, and then met with them in person in late 2011. *Id.* At the meeting, he was shown a photo lineup. *Id.* He said that the person he saw outside the car the night his mother was shot was not in any of the photos. *Id.* at 24. Indeed, CJ indicated that he was "a hundred percent" sure that none of the men in the photos was the perpetrator. *Id.* CJ made clear that he had never previously seen pictures of the men convicted for killing his mother. *Id.* He had never lived in the neighborhood where his mother was killed, and he did not know the men convicted for her murder. *Id.* at 25.

CJ made clear that his main interest is to see his mother's killer punished. *Id.* **He reiterated that he is "positive" that he would recognize the shooter if he saw him, and he affirmed in court that the perpetrator was neither Mr. Scott nor Mr. Johnson.** ***Id.***

CJ made clear that this is still a difficult subject for him to think about, and he was not pleased with defense counsel for transporting him across state lines to give testimony. *Id.* at 71, 73-74. In the days leading up to the hearing, when defense counsel traveled to Pennsylvania to meet with him, CJ refused the attorney meeting. *Id.* at 74. CJ was incarcerated at the time Lewis contacted him because he had lied to protect his best friend. *Id* at 22. However, he would never lie to protect someone he does not know, and he certainly would tell the truth to implicate his

mother's killer. *Id.* at 24-25.

Katherine Rosenblum is a licensed clinical psychologist and a research scientist at the University of Michigan Medical School. EH 5/27/15 at 4-5. She has a dual Ph.D. in Clinical and Developmental Psychology and has worked extensively with children of all ages. *Id.* at 5. Dr. Rosenblum specializes not only in developmental psychology ("the study of how and why people change over the course of the life span"), but also in children who have experienced trauma. *Id.* at 5-6. Dr. Rosenblum was qualified as an expert in clinical and developmental psychology with a particular focus on children. *Id.* at 7.

Dr. Rosenblum was asked to provide a professional opinion about CJ. *Id.* at 8. She never met CJ, but she did review his affidavit and letters, as well as a memo summarizing the case. *Id.* at 12. Being asked to render a professional opinion in this manner was not unusual for Dr. Rosenblum: In her day-to-day clinical work, she is routinely asked to consult about and give opinions on people she has not evaluated in person. *Id.* at 8.

Dr. Rosenblum was specifically asked for her opinion on whether "it would be reasonable [and consistent with her clinical experiences] for someone to witness a traumatic event, not speak of it for a period of years, and then eventually start talking about it." *Id.* She first stated that an 8-year-old who saw a traumatic event would be certainly mature enough to take it in and have clear memories of it. *Id.* at 8-9. She then noted that it is very common for children who have experienced traumatic events to avoid talking about them: such avoidance is "actually a cardinal symptom." *Id.* at 10, 20, 22. Family members will often avoid asking about these events in the immediate aftermath to minimize trauma and stress. *Id.* at 9-10.

Dr. Rosenblum also noted that research suggests a "narrowing of attention" in moments of high traumatic stress that leads people to "focus on and remember very clearly particular details . . . to the exclusion of some other more peripheral details." *Id.* at 9. These memories are

also very resilient. *Id.* at 20. When asked whether "because of the passage of time . . . exaggeration at times enter[s] into the picture," she responded that can happen with some memories, but such exaggeration is less likely with memories of especially remarkable events and memories made in a moment of high traumatic stress. *Id.*

Despite years of avoidance, it would be reasonable for the person who experienced the trauma to one day choose to start talking about it, particularly "under different circumstances." *Id.* at 10. "Maturity and greater distance from the event" could account for someone's decision to speak up after many years of avoidance. *Id.* at 11. A person who is avoiding discussion of a traumatic event is more likely to speak about it in response to direct questions, as opposed to going out of his way to offer information. *Id.* at 23.

Christiana Signs (formerly Christiana Schmitz) worked on Mr. Scott's and Mr. Johnson's cases as a student in the Michigan Innocence Clinic during the 2011-12 academic year. EH 4/8/15 at 48-50. Signs now lives in Philadelphia and is a labor/employment attorney with the law firm of Greenberg Traurig. *Id.* at 49.

Signs learned from Scott Lewis that CJ was a potentially helpful eyewitness in this case. *Id.* at 50-51. Prior to obtaining that information, Signs had known that young children were in the van but "didn't know that anybody had witnessed the crime." *Id.* at 51. When Signs spoke with CJ on the phone in October 2011, he gave a description of the shooter. *Id.* at 52.

Signs then visited CJ in prison in Pennsylvania to obtain further details and to administer a photo lineup. *Id.* The directions given to CJ in advance stated: "The person who you saw on the night of the murder of your mother, Lisa Kindred, may or not be in a picture in the photo array that you are about to view." *Id.* at 58. For each of the 20 photos, CJ was asked the question: "Do you recognize the person in the picture as the person you saw outside the van when your mother was shot?" *Id.* at 60. CJ answered "no" for every photo. *Id.* at 63.

In creating the photo lineup, Signs sought to present CJ with photos of Mr. Scott and Mr. Johnson from the time of the crime. *Id.* at 55. She therefore used photos of the defendants from 1999, and the filler photos were taken from the Michigan Department of Corrections online offender database. *Id*. All 20 photos were cropped so as to remove backgrounds and were then pasted to index cards to be held up for CJ in the identification procedure. *Id.* at 56.

Prior to conducting the lineup, Signs researched best practices such as double-blind and sequential lineups. *Id.* at 52-53, 60-62. She used a double-blind method to ensure she did not influence CJ as he viewed the photos. *Id.* at 59. When she held up the cards, only the number on the back was visible to her (and her colleagues). *Id.* at 60-61. She did not know which photo each number referred to and thus had no idea if she was holding up a photo of one of the defendants or one of the fillers. *Id*. at 60-61, 62. The photos were shown to CJ one at a time. *Id.* at 62.

Scott Lewis is a licensed private investigator and a former investigative reporter with decades of investigative experience. EH 4/15/15, at 15-16. Lewis began looking into the murder of Lisa Kindred in the fall of 2009 after he received a letter from Mr. Johnson. *Id*. at 18. As part of his review of the case, he consulted Detective Michael Carlisle, a retired Detroit homicide investigator. *Id*. at 19-20. Carlisle reviewed the case materials and was featured in Lewis's news stories about the case. *Id*. at 20. After consulting with Carlisle, Lewis continued investigating the case, as he "was astounded that the police didn't investigate the husband." *Id*.

As Lewis continued reviewing the case materials, he "realized that there was no reference to the police ever questioning CJ Skinner." *Id*. at 21. Knowing CJ would have been 8 years old at the time of the crime, Lewis became interested in obtaining his account. *Id*. at 21-22. Locating CJ "was very difficult and time consuming." *Id*. at 23.

Antonio Burnette, one of the only two inculpatory witnesses to testify at the defendants' trials, recanted that testimony at the evidentiary hearing. EH 4/8/15 at 9-10. Burnette made clear

neither defendant confessed to robbing or shooting a woman, and he did not see either of them with a gun on the night of the shooting or the next day. *Id.* at 9-10.

Burnette testified that at the time of the murder, he was a minor, intoxicated, and was afraid of the police. *Id.* at 10, 21. He had been with Mr. Johnson on the night of the murder, and he knew that the police regarded Mr. Johnson as a suspect. *Id.* at 11, 21. Therefore, he was afraid that he himself would be charged with the murder if he did not say what the police wanted to hear. *Id.* at 10-11, 14, 19-20, 22-23. This is consistent with what Burnette said in his original testimony, that he inculpated Mr. Scott and Mr. Johnson out of fear for himself. PE 5/26/99 at 68-69, 77. Burnette was never threatened by Mr. Scott, Mr. Johnson, or their families. EH 4/8/15 at 12. To the extent he ever said he was afraid of or threatened by them, it was a lie. *Id.* at 13-16.

At the time of his testimony at the evidentiary hearing, Burnette was less than two weeks away from being released on parole. *Id.* at 12. He made clear that he had nothing to gain by recanting, and that he was doing so simply to address "all the bad and the hurt" that he caused, "so [he] can move forward [with his] life." *Id.* at 12-13.

Lameda Thomas testified to the recantation of Raymond Jackson, the only other inculpatory witness besides Burnette. The parties stipulated that Jackson is dead. EH 4/8/15 at 47. Thomas is Jackson's cousin; her grandmother and his mother were sisters. EH 4/15/15 at 35.

Jackson spoke to Thomas about his testimony on two occasions. *Id.* at 35. He told her that his testimony was a lie he told out of fear of police and the prosecution. *Id.* at 35-36, 39, 41.

Curtis Williams represented Mr. Scott at trial (and at the preliminary examination). EH 5/15/15 at 77. Williams was aware that children had been in the van when the victim as shot, but he was not aware of any interviews with them, and he did not interview them himself. *Id.* at 78. He was under the impression (which he admitted was mistaken) that "they were very small children incapable . . . of giving any information." *Id.* at 88-89. If Williams had known that there

was a 7 or 8-year-old child in the van who had witnessed the incident, then he would have attempted to interview him: "That would have been very helpful to the defense. I think it would have colored the way we handled the matter had we known that." *Id.* at 78. If the child witness indicated that Mr. Scott was not the shooter, Williams "would have been interested in presenting that testimony," because that would "have been a better defense than we presented at trial." *Id.* at 78-79. Had he known such a witness existed, Williams "could have certainly requested the Court's assistance in getting access to a witness wherever that witness might be." *Id.* at 91.

Williams was previously unaware of the domestic violence reports pertaining to Will Kindred. *Id.* at 80. If he had been aware, he would have sought to use the reports to impeach Will Kindred at trial. *Id.* at 82-83. Regarding Burnette and Jackson, Williams "had no thought that either . . . would ever recant." *Id.* at 84-85. If he had, Williams would have pursued the issue because "that would have been the end of the case had they recanted at the time." *Id.* at 85.

Rosemary Robinson, a member of the Michigan House of Representatives, was a defense attorney for 40 years, and she represented Mr. Scott on direct appeal. EH 4/8/15 at 35-36. She was aware that children were present in the van, but she never interviewed them. *Id.* at 39. She mistakenly believed that all of the children were too young, and she only recently learned that one of them was 7 or 8 years old. *Id.* If she had suspected that a 7 or 8-year-old witness in the car had seen the shooter, she "absolutely" would have interviewed him. *Id.* If the witness indicated that her client was not the shooter, she would have pursued that on appeal. *Id.*

Domestic Violence Records: Finally, in addition to the witness testimony, the trial court admitted various exhibits, including Exhibit 1, a set of unredacted domestic violence and divorce related documents pertaining to Will Kindred. Appendix D. The reports outline a series of domestic incidents between Will and Lisa Kindred, including one where Will assaulted Lisa and threatened to kill her whole family. *Id.* at 6-7. On at least two occasions, police confiscated .22

caliber weapons from Will. *Id.* at 8, 12.

e. *TRIAL COURT DECISION, PEREMPTORY REVERSAL MOTION AND APPEAL*

Following the evidentiary hearings, Judge Callahan issued oral findings and an opinion denying both defendants' motions for relief from judgment. EH 08/07/2015 at 24.

Judge Callahan found that the evidence presented at the hearing showed that the death of Lisa Kindred did not stem from a robbery-gone-bad but was instead likely a planned hit set up by Will Kindred. *Id.* at 16. Nevertheless, he denied relief upon the possibility that Mr. Johnson and Mr. Scott "may very well have been the co-conspirators involved in this murder plot." *Id.* at 20.

As to CJ, Judge Callahan did agree that the description given by CJ was "completely contrary to the physical characteristics of both defendants in this case," and noted that CJ "clearly says [defendants] were not the individuals that were involved in this shooting." *Id.* at 18. Nevertheless, he held that CJ's account was insufficient to warrant relief.

Because Judge Callahan concluded that the evidence does not support and armed robbery/felony murder theory (the only theory presented to the factfinder), but upheld the convictions anyway, Mr. Scott and Mr. Johnson sought peremptory reversal from the Court of Appeals. The court denied the motion, but **Judge Kurtis Wilder indicated that he would have granted peremptory reversal.** Peremptory Reversal Order, Appendix A.

On appeal, the Court of Appeals affirmed the decision denying relief from judgment in a joint opinion dated May 31, 2016. Majority Opinion, Appendix A. The court first noted that Skinner's account was new evidence that could not have been discovered before, meaning there are no procedural problems under MCR 6.502(G)(2) or MCR 6.508(D)(3). *Id.* at 3-4. It then concluded that the first three *Cress* prongs are satisfied with respect to Skinner's account. *Id.* at 5. Regarding the fourth *Cress* prong, whether the new evidence makes a different result reasonably probable, the court noted that Judge Callahan based his finding that Skinner's account

is insufficient to warrant a new trial on four factors:

> (1) Skinner was only eight years old at the time of the murder and his memory some 16 years later could not be certain; (2) it would have been incredibly difficult for Skinner to be inside a car at night and see someone outside the vehicle when the only illumination was from the vehicle's interior dome light, especially when considering that both Lisa and the car door were between him and the shooter; (3) Skinner had already been convicted for perjury; and (4) in any event, Skinner likely would have been asleep inside the car at the time of the murder.

Id. at 6. The Court of Appeals agreed that the fourth reason given by Judge Callahan constituted clear error, as even the prosecution had conceded. *Id.* Nevertheless, the Court of Appeals majority indicated that the trial court did not clearly err in reaching the other three conclusions, and thus the ultimate decision could be affirmed. *Id.*

Judge Deborah Servitto wrote separately to state that she believed the third reason given by the trial court was also clear error, but the trial court's decision could be affirmed on the basis of just its first two reasons. Servitto Concurrence at 1-2.

The Court of Appeals held that the other evidence presented at the evidentiary hearings—the recantations of Burnette and Jackson and the victim's husband's history of domestic violence—were outside the scope of this Court's remand, and the trial court erred in allowing a record to be made on those claims. Majority Opinion at 9-10. Even though this evidence convinced the trial court that the murder could not have been part of an attempted robbery (which was the only theory presented to the factfinder at trial), the Court of Appeals concluded that the trial court's opinion on this matter was "not pertinent." *Id.* at 10.

ARGUMENT

Introduction

This is a truly exceptional case. This Court will almost certainly never see another case where a murder victim's own son—an undisputed eyewitness to the murder, in a case that has no other eyewitnesses—has definitively exculpated the defendants, and yet the lower courts have denied relief. The denials below stem from a fundamental misunderstanding of how the materiality prong of the *Cress* standard is supposed to operate. This Court has shown in *Cress* and *Grissom* that it intends *Cress* materiality to be a holistic inquiry, weighing all of the new evidence against the old. This makes sense: one can hardly decide whether new evidence warrants a new trial without also considering and weighing the original evidence.

In this case, however, the lower courts failed to consider the weakness of the inculpatory evidence in deciding whether CJ Skinner's eyewitness account creates a reasonable probability of a different outcome on retrial. Given that key parts of the inculpatory testimony have been proved impossible based on independently verifiable events, it was an abuse of discretion for the lower courts to deny relief. Even if a jury might have some questions about Skinner's account, it would consider these questions not in a vacuum, but in conjunction with the obvious credibility issues that the prosecution's own case has. And there is a reasonable probability that such balancing of the evidence would favor Mr. Scott and Mr. Johnson.

Indeed, a full evaluation of the record of this case makes clear that sustaining Mr. Scott's and Mr. Johnson's convictions is patently unreasonable. The trial judge below concluded that the evidence in this case cannot support an attempted robbery theory—the only theory presented to the factfinder at trial. **Having concluded that the evidence cannot support the only theory of guilt the prosecution presented to the factfinder, the trial court obviously abused its discretion in denying relief from judgment.**

This Court should either summarily reverse and remand for a new trial, or grant leave to appeal to address the important legal claims presented below.

Standard of Review

A trial court's ruling on a motion for relief from judgment under MCR 6.500 is reviewed for abuse of discretion. *People v McSwain*, 259 Mich App 654, 681; 676 NW2d 236 (2003). Findings of fact are reviewed for clear error. *Id.* Questions of law are reviewed *de novo*. *People v Washington*, 468 Mich 667, 670-671; 664 NW2d 203 (2003).

A trial court abuses its discretion when it "chooses an outcome that falls outside the range of reasonable and principled outcomes." *People v Unger*, 278 Mich App 210, 217; 749 NW2d 272 (2008) (citation omitted). Appellate courts "examine the reasons given by the trial court. . . . Where the reasons given by the trial court are inadequate or not legally recognized, the trial court abused its discretion." *People v Leonard*, 224 Mich App 569, 580; 569 NW2d 663 (1997) (citation omitted).

A trial court clearly errs when its "findings do not accurately portray the factual background of the case." *McSwain*, 259 Mich App at 682-83 (citation omitted). A "finding is clearly erroneous when…the reviewing court, **on the whole record**, is left with a definite and firm conviction that a mistake has been made." *Bynum v ESAB Grp.*, 467 Mich 280, 285; 651 NW2d 383 (2002) (emphasis added).

While trial courts are given deference, the clear error standard has been interpreted to mean (1) reviewing courts give "less deference to the factual findings of trial judges than to the factual findings of juries"; and (2) a trial court can be "clearly erroneous even when there is some evidence to support [its findings]." *McSwain*, 259 Mich App at 682-83 (citation omitted).

I. The Court Of Appeals Clearly Erred In Its Evaluation Of Whether The Account Of CJ Skinner Satisfies The Fourth *Cress* Prong: Although This Court Has Favored A Holistic Inquiry, The Court Of Appeals Failed To Even Mention What The Trial Evidence Was, Much Less Consider Its Weaknesses, And It Declined To Consider Other Significant Evidence In The Record.

A defendant will be granted a new trial based on newly discovered evidence where: (1) the evidence itself, not merely its materiality, is newly discovered; (2) the evidence is not cumulative; (3) the party could not, using reasonable diligence, have discovered and produced the evidence at trial; and (4) the evidence makes a different result reasonably probable on retrial. *People v Cress*, 468 Mich 678, 692; 664 NW2d 174 (2003) (citations omitted).

In this case, the Court of Appeals agreed that the first three prongs of the *Cress* test are satisfied, and "the central issue" here is whether the fourth prong is met. Majority Opinion at 5, Appendix A. This Court's precedents on *Cress* materiality (the fourth prong) make clear that the inquiry must involve an evaluation of the proposed new evidence in light of all the evidence, new and old, to decide whether the evidence "would make a different result reasonably probable on retrial." *People v Tyner*, 497 Mich 1001; 861 NW2d 622 (2015).

Cress itself is an example of the materiality prong of the new evidence test being evaluated, not by viewing the proposed new evidence in a vacuum, but rather in conjunction with the other evidence from the case. The new evidence at issue in *Cress* was the confession of a third party, Michael Ronning. *Cress*, 468 Mich at 682. Nevertheless, in weighing materiality, this Court considered the other facts from the case and ultimately concluded that Ronning's confession was not credible because it "sharply deviated from the established facts regarding the crime." *Id.* at 692-93. In other words, this Court engaged in a substantive review of the evidence presented at trial and then decided whether the new evidence is credible, given the strengths and weaknesses of the trial evidence.

The Court of Appeals in the case at bar did not follow suit. There is not a single mention

in its opinion about the credibility of Antonio Burnette and Raymond Jackson, the only two inculpatory witnesses, even though **much of their testimony has been proven to be impossible by independently established events** (as detailed below).

People v Grissom, 492 Mich 296; 821 NW2d 50 (2012), is another clear example of a holistic materiality review. The new evidence at issue in *Grissom* was impeachment evidence against the complainant in a rape conviction: Years after conviction, it was discovered that the complainant had fabricated rape allegations in other instances. *Id.* at 305-11. In determining the materiality of this new evidence, this Court noted the necessity of balancing the new impeachment evidence against the other "evidence presented against defendant that did not involve the complainant's credibility." *Id.* at 311. This Court remanded for a materiality analysis, directing "the trial court [to] carefully consider the newly discovered evidence in light of the evidence presented at trial." *Id.* at 321. *See also id.* at 338-42 (Markman, J., *concurring*) (repeatedly stressing the need to weigh the credibility of the evidence from trial as part of a proper *Cress* materiality inquiry).

Despite this Court's prior directions, the Court of Appeals in this case clearly failed to consider the strengths or weaknesses of the original evidence from trial in deciding *Cress* materiality. Specifically, there were three categories of evidence in the record (detailed in the subsections A, B and C below) that needed to be considered, and the Court of Appeals either failed entirely to address them or engaged in a clearly erroneous analysis when addressing them.

A. The Court Of Appeals Clearly Erred In Failing Entirely To Address The Original Evidence From Trial: Crucial Parts Of The Testimony Of The State's Witnesses Have Been Shown To Be Impossible, And All Of The Inculpatory Testimony Has Been Recanted.

As *Cress* and *Grissom* recognize, a court cannot determine whether the new evidence warrants a new trial without considering the old evidence that actually led to the conviction. For

example, if a case features clear video footage showing the defendant committing the crime, a new alibi witness may not create the reasonable probability of a different outcome at retrial.

However, if the inculpatory evidence in the case was minimal and highly impeached at trial—and would be more impeached or even recanted upon retrial—then a single new exculpatory witness may in fact be enough to warrant relief under *Cress*. As the United States Supreme Court in the *Brady* context: "**if the verdict is already of questionable validity, additional evidence of relatively minor importance might be sufficient to create a reasonable doubt**. *United States v Agurs*, 427 US 97, 112-13; 96 S Ct 2392; 49 L Ed 2d 342 (1976) (emphasis added).

In the case at bar, the Court of Appeals never evaluated the credibility of the original inculpatory evidence at trial at all. Had that evaluation been made, it would be clear that Mr. Scott's and Mr. Johnson's convictions are "already of questionable validity," and a witness like CJ Skinner could reasonably lead to an acquittal upon retrial.

Antonio Burnette and Raymond Jackson were crucial witnesses for the prosecution: their second-hand accounts were the only inculpatory evidence ever presented. Now both witnesses have recanted, and much of their testimony has been proven untrue by other facts.

That Burnette lied at trial is proved by independently established facts. Burnette implicated the defendants by: 1) saying they confessed to "hitting a lick" when he met up with them at 2:30-4:30 a.m. the night of the murder, and 2) saying that he saw each defendant hide a gun in their respective girlfriends' cars. **Both points of his testimony are verifiably untrue.**

When asked what time he saw Mr. Scott place a gun in his girlfriend's car, Burnette said over and over that it was the next morning around 7:00 or 8:00 a.m. PE 5/26/99 at 56, 62; Co-Def Tr. 1/11/00 at 30-31; 43-44, 51-52, 55. **This is not possible because Mr. Scott was already in custody by that time**, as shown by his witness statement, which was given at 6:55 a.m. at the

Detroit Police Department. Stipulation at EH 4/15/15 at 5. Indeed, Officer Jon Falk's report, signed at 5:40 a.m., notes that Mr. Scott had already been "conveyed to section" by that time. Falk Report, p. 4, Ex. 4 at Hearing, Appendix E. Furthermore, police officer Rodney Jackson affirmed that when he arrived at work on the morning in question, which he put at 8:00 or 8:30 a.m., because Mr. Scott was still in custody. Co-Def Tr. 1/10/00 at 71-72. Therefore, Burnette simply could not have seen Mr. Scott place a gun in his girlfriend's car as he repeatedly said he saw "the next morning." Mr. Scott had already in custody for hours by then.[3]

Next, when asked at trial what time the conversation occurred in which he claimed Mr. Johnson and Mr. Scott talked about hitting a lick and shooting somebody, Burnette consistently stated that it started around 2:30 or 3:00 a.m., and lasted until perhaps 4:30 a.m. PE 5/26/99 at 31, 47, 77; Tr. 5/31/00 at 90, 145; Co-Def Tr. 1/11/00 at 12, 54. However, **Mr. Scott was already in custody by that point and could not have participated in that conversation**. Officer Willie Soles transported Mr. Scott and Raymond Jackson to the homicide division for questioning shortly after the murder. Soles Report, p. 2, Ex. 5 at Hearing, Appendix F. His report does not list a time, but given that this shooting happened between midnight and 1:00 a.m., the implication is that Mr. Scott was arrested shortly after 1:00 a.m. *See also* Scola Report p. 1, Ex. 6 at Hearing, Appendix G. Raymond Jackson, who was arrested alongside Mr. Scott, estimated that he was arrested at 1:15 a.m. and in custody for 4-5 hours before making his statement, which lists a time of 5:10 a.m. Tr. 5/31/00 at 135; Stipulation at EH 4/15/15 at 5.

This evidence shows a strong likelihood that Burnette's original testimony implicating

[3] This critical fact came up repeatedly at the preliminary exam and at Mr. Johnson's January 2000 trial, but it did not come up at all at Mr. Scott's May 2000 trial. The prosecution apparently avoided the issue because it understood how problematic it would be for Burnette to say that he saw Mr. Scott with a gun at 7:00 or 8:00 a.m., when Mr. Scott was known to be in custody by that time. Unfortunately, Mr. Scott's trial counsel never impeached Burnette with his prior testimony on this point, **so the jury at Mr. Scott's trial never learned about this glaring inconsistency.**

Mr. Scott and Mr. Johnson was completely false. Burnette also recanted his trial testimony under oath at the evidentiary hearing, indicating that he implicated Mr. Scott and Mr. Johnson out of fear of the police. EH 4/8/15 at 9-11, 14, 19-20, 21-23.

The only other inculpatory witness, Raymond Jackson, had just been released from the hospital after psychiatric treatment when brought in to testify. PE 5/26/99 at 5-6. He admitted that he heard and saw things that were not there, and that he had trouble distinguishing the real from the imagined. Co-Def Tr. 1/11/00 at 87, 96, 120. At trial, Jackson averred that he was afraid that he would be charged with the murder, and he only implicated the defendants after being told that they were implicating him. PE 6/4/99 at 45, 55; Co-Def Tr. 1/11/00 at 97, 115. His fearfulness is affirmed by his recantation to his cousin, who indicated that Jackson told her he lied to implicate Mr. Scott and Mr. Johnson out of fear. EH 4/15/15 at 35-36, 39, 41.

The Court of Appeals failed to consider any of these facts in deciding whether Skinner's new eyewitness account would create a reasonable probability of a different outcome.[4] That failure was clear error, given the directives of *Cress* and *Grissom*.

B. The Court Of Appeals's Materiality Analysis Of Skinner's Account Was Clearly Erroneous Because The Court Analyzed Only The Four Points That The Trial Court Discussed, Rather Than Weighing The Full Weight And Credibility Of The New Eyewitness In Proper Context.

The Court of Appeals agreed that Skinner's account was the central evidence, but it failed to evaluate the full weight and credibility of that significant new evidence. The pertinent question when evaluating the fourth *Cress* prong is whether there would be a reasonable

[4] The trial court also failed to at all address the independent facts that prove crucial parts of Burnette's testimony to be impossible. As to the recantations, the trial court simply issued a blanket statement indicating that recantations, if they emerge after trial, are *per se* unimportant. *Id.* at 13 ("There was no preliminary indication that they were lying. . . . And so the idea that there was a recantation by Mr. Jackson really is repulsive . . . [a]nd the testimony of Mr. Barnett [sic] falls into that same category."). Such a holding was abuse of discretion because recantations, if credible, can warrant relief. *People v Barbara*, 400 Mich 352, 363; 255 NW2d 171 (1977); *People v Keller*, 227 Mich 520, 524; 198 NW 939 (1924).

probability of a different outcome upon retrial. *See e.g. Tyner*, 497 Mich 1001. This means that the analysis is centered on everything the new jury would be able to consider.

Thus, the trial court answered the wrong question, essentially holding that a new trial is not warranted because the judge himself did not find Skinner's account perfectly credible. The Court of Appeals answered the wrong question as well, limiting its review to whether the four reasons Judge Callahan gave for not believing Skinner were reasonable.

The real question is not what Judge Callahan *would do*, but rather what a new jury *reasonably could do* if presented with the full evidence of this case on retrial. In answering the wrong question, the lower courts abused their discretion. *See Grissom*, 492 Mich at 321 (abuse of discretion "necessarily" established where court applied wrong legal standard).

1. The factors the Court of Appeals mentioned all support the defendants' position: A proper analysis of all four supports a finding of 'reasonable probability of a different outcome.'

Because all of the four factors the Court of Appeals discussed favor Mr. Scott and Mr. Johnson, the court clearly erred in affirming the trial court's decision.

i. The trial court clearly erred in finding that Skinner was most likely asleep when the shooting occurred.

There is no disagreement that the trial court clearly erred on this point. The prosecution has agreed that there is nothing in the record to support this finding, and the Court of Appeals took as a given that this finding was clear error. Majority Opinion at 6.

ii. The trial court clearly erred in finding that Skinner's memory of the events would be per se *insufficient, given that 16 years had passed since the night of the shooting.*

Although Skinner's account of the night of the shooting is detailed and corroborated by other evidence from the case, Judge Callahan seized on trivial points to conclude that Skinner's memory is insufficient. To the extent there were any small inconsistencies, this supports

Skinner's credibility. *See People v Grant*, 470 Mich 477, 491 n.10; 684 NW2d 686 (2004) ("Some internal inconsistencies are expected when children recall an incident long past.").

Moreover, Judge Callahan's findings ignored the actual record, instead relying on speculation. For example, he found it problematic that Skinner could not answer his questions about unrelated details such as the name of his school or his third-grade teacher. EH 8/7/2015 at 21. As a result, the judge rejected Skinner's description of the night of his mother's murder, saying, "I bet he couldn't remember what his mother looked like today." *Id.*

However, Judge Callahan ignored Dr. Rosenblum's uncontested testimony indicating that traumatic events can lead to a "narrowing of attention" such that people "focus on and remember very clearly particular details . . . . to the exclusion of some other more peripheral details." EH 5/27/15 at 9. These memories made in a moment of high traumatic stress are less susceptible to exaggeration over time. *Id.* The judge compounded his error by stating that Skinner's account lacks credibility because he (the judge) could not recall the faces of his own father and wife, who both passed away some years ago. EH 8/7/15 at 21. But as Dr. Rosenblum said, memories formed under moments of stress are quite resilient. Any lay juror could reasonably accept that traumatic experiences are "burned into" memory, while other events are easily forgotten.

Judge Callahan did not account for any of Dr. Rosenblum's testimony in his findings, although he had admitted her "as an expert in the field of clinical and developmental psychology with a particular focus on children." EH 5/27/15 at 7. The Court of Appeals stated that the trial court is not obligated to accept Dr. Rosenblum's opinion. Opinion at 6. That statement misses the point. Certainly the trial court is not obligated to accept the account of any witness, but if the court deems a certain witness's uncontroverted account insufficient, there have to be reasons. *See e.g. Leonard*, 224 Mich App at 580 (abuse of discretion occurs "[w]here the reasons given by the trial court are inadequate."); *People v Thenghkam*, 240 Mich App 29, 42; 610 NW2d 571 (2000)

("[a] factual finding without support in the record constitutes clear error.") (*abrogated on other grounds by People v Petty*, 469 Mich 108; 665 NW2d 443 (2003)). The trial court did not provide a single reason why Dr. Rosenblum's unrebutted testimony was insufficient. Instead, Judge Callahan simply followed his gut feeling over the opinion of an eminently qualified child psychologist. Judge Callahan is entitled to his personal opinion, but his task was to evaluate *whether a jury upon retrial reasonably could* accept Dr. Rosenblum's position and thus deem Skinner's memory to be credible enough. The answer to that proper question is an obvious "yes."

iii. The trial court clearly erred in finding that there was insufficient light for Skinner to view the shooter, or that his view of the shooter would have been obstructed.

Judge Callahan found that Skinner could not have seen the shooter outside the van because the interior dome light of the car does not illuminate anything outside the car, and the Court of Appeals deemed this finding to be reasonable. However, the courts below clearly erred because this finding neither acknowledged nor accounted for the many cases cited by the defense that establish that a car's interior dome light *can* illuminate things outside of the car.[5]

In this case, it was especially likely that the dome light would have illuminated the shooter's face because, as Skinner noted, the shooter was "damn near" his mother as she got into the car. EH 5/15/15 at 29. The Court of Appeals's assertion that "Skinner did not testify that the

[5] *See e.g. People v Tyner*, No. 309729, 2014 WL 2566246 (Mich App June 5, 2014) (upholding conviction based on witness identification of defendant who was standing outside of a car, illuminated by the car's dome light) (*reversed on other grounds*, 861 NW2d 622 (Mich 2015)); *Seals v Rivard*, No. 07-11309, 2014 WL 1091749, (ED Mich Mar 18, 2014) (denying habeas relief in case where witness identified gunman outside his own car illuminated only by the car's dome light); *Caldwell v Lafler*, No. 4:04-CV-133, 2008 WL 907536 (WD Mich Mar 31, 2008) (denying habeas relief where witness had "testified that because his car door was open during the robbery, the dome light provided enough light for him to identify Petitioner as his assailant.") (all unpublished, attached as Appendix H). (The citation to the unpublished *Tyner* opinion satisfies MCR 7.215(C)(1) because the case is cited simply as an example of a factual situation where courts and juries have deemed reasonable the same fact pattern that the trial court erroneously deemed to be *per se* unreasonable, and because Mr. Scott has not found Michigan published authority involving the same facts).

shooter leaned inside the car or was ever located near the door opening while the door was open," Opinion at 6, is flatly contrary to Skinner's testimony.

Mr. Scott and Mr. Johnson certainly made a sufficient showing that a jury *could deem reasonable* Skinner's account of seeing the shooter. Judge Callahan clearly erred in ignoring the only evidence in the record on this point to summarily conclude that there was not enough light to see the shooter. "[A] factual finding without support in the record constitutes clear error." *Thenghkam*, 240 Mich App at 42.

Judge Callahan also found that Skinner could not have seen the shooter because his mother would have obstructed his view, and the Court of Appeals also deemed this finding to be reasonable. However, the record proves otherwise; Judge Callahan did not even acknowledge Skinner's repeated assertion that the shooter was not directly behind his mother, but rather was off to the side. EH 5/15/15 at 13, 28, 29. **Skinner drew a depiction of the encounter which shows the shooter off to the side, and not directly behind his mother**. *See* Drawing; Appendix C. There was simply no basis in the record for the trial court to find that Skinner's view would have been obstructed by his mother, and thus that finding was clear error. Again, "[a] factual finding without support in the record constitutes clear error." *Thenghkam*, 240 Mich App at 42.

iv. The trial court abused its discretion in finding that Skinner could be lying to protect his mother's killer.

In perhaps the most unreasonable of his findings—anchored in nothing in the record, and actually contrary to much of it—Judge Callahan speculated that Skinner's account may have been induced or simply an outright lie, given that he has a prior conviction for lying. EH 8/7/15 at 17-18. Two judges on the Court of Appeals panel deemed this finding to be reasonable, though Judge Servitto wrote separately to note it is unreasonable to conclude that Skinner would lie to protect his mother's killer. Majority Opinion at 7; Concurrence at 2.

Judge Callahan speculated that Skinner's account may have been induced: "Who's to say what influences may have been plied against Mr. Skinner?" EH 8/7/15 at 17. Because those words make it clear that the judge relied on speculation instead of facts in the record, his findings on this point were clear error. *Thenghkam*, 240 Mich App at 42 ("[A] factual finding without support in the record constitutes clear error.").

Skinner made clear that he is not friendly with the defense, and indeed refused to meet with defense counsel when they traveled to Pennsylvania in the days leading up to the hearing. EH 5/15/15 at 73-74. Further, Skinner made clear that he does not know Mr. Scott or Mr. Johnson, had no prior contact with them, and has no incentive to help either of them. *Id.* at 24-25. And it is hard to see how Mr. Scott or Mr. Johnson could have "plied influences" given that they are incarcerated in Michigan, and Skinner has resided in eastern Pennsylvania since 1999.

Further, Judge Callahan suggested that Skinner's account *per se* lacks credibility because he has lied in the past. EH 8/7/15 at 18 ("Should we believe him, seeing as how he was in prison for perjury? I mean good grief. Doesn't that go right to the essence of it?"). But in our justice system, prior missteps are not a permanent bar against credibility. A jury reasonably could believe that Skinner is telling the truth *in this case*. Jury instructions counsel weighing prior convictions "along with all the other evidence" in judging credibility. Mich. Crim. JI 5.1.

In this case, **Skinner's testimony is about his mother's death, and to lie would be to take the risk that the true killer walks free,** while the prior lie that Skinner told was to protect his best friend. EH 5/15/15 at 22. For Judge Callahan to refuse to evaluate the circumstances, as a jury would do at retrial, and instead to categorically deem Skinner a liar because he once lied in the past, was legal error constituting abuse of discretion. *Grissom*, 492 Mich at 321.

2. Several Other Factors Corroborate Skinner's Account, And The Lower Courts Clearly Erred In Failing To Consider Them.

Whether or not Skinner's account is credible is an analysis that turns on more than just the four factors the courts below mentioned. There are many additional reasons why a jury reasonably could find Skinner's account credible.

First, Skinner's testimony was corroborated by other witnesses and evidence in the trial record, something the courts below failed to even acknowledge. Skinner recalled that that the movie the family had seen was "Life." EH 5/15/15 at 45-46. This is consistent with the police statement of Verlin Miller, which notes that Will told him that they had seen "Life." Statement of Verlin Miller; Appended to Post-Hearing Brief in Trial Court. Skinner recalled that his mother was driving, which is consistent with Will's testimony from trial. *Id*; Co-Def Tr. 1/10/00 at 22. Skinner's recollection of the subsequent events (his mother growing agitated, going to the door to speak with Will, and then returning to the car just before the shooter emerged) is also corroborated by the testimony of Will Kindred and Miller. *E.g.* PE 5/26/99 at 13-14; Co-Def Tr. 1/10/00 at 15-16, 35, 41-42. Finally, his recollection that only one shot was fired, and that the glass shattered when the shot was fired, is consistent with the testimony of the medical examiner, who concluded that Lisa was shot one time, and likely through glass. PE 5/26/99 at 9–10.

Second, Skinner's behavior and attitude—from the first letter that Scott Lewis sent him in 2011 through the day he testified in court in 2015—make it more likely that a reasonable jury would find him credible. In his first letter to Lewis, Skinner made clear that he wanted to tell the truth, regardless of whether it inculpated or exculpated the men currently in prison: The letter concluded with: "I will never forget the person's face, and if it is him, I will testify against him. But if it's not, I would not mind testifying on his behalf." EH 5/15/15 at 20. At the hearing, Skinner again made clear that his primary motive was to find his mother's true killer. *Id.* at 25.

Certainly Skinner was not pleased with defense counsel for transporting him across state lines to give testimony. *Id.* at 71, 73-74. In the days leading up to the hearing, when defense counsel traveled to Pennsylvania to meet with him, Skinner refused the attorney meeting. *Id.* at 74.

A reasonable jury on retrial would find that Skinner has acted with proper motives and has attempted to give the full truth about the most traumatic experience of his life. The jury would see that Skinner is not biased towards either of the defendants or defense counsel, and he was certainly not happy to be called in to testify. Nevertheless, Skinner made absolutely clear that neither Mr. Scott nor Mr. Johnson could have been the perpetrator. Such powerful eyewitness testimony from the victim's own son, the only eyewitness ever presented in this case, creates a reasonable probability of a different outcome upon retrial.

3. Judge Callahan findings pertaining to Skinner deserve less deference than factual findings in other cases because: a) he was not the trial judge, and b) the findings were not based on intangibles that only the trial court can properly evaluate, but rather on factors that the appellate courts can evaluate equally.

The Court of Appeals stressed deference to trial court findings as an important principle, almost as if to say that the concept of deference ends the inquiry. Opinion at 7. The court cited to *Tyner*, 497 Mich 1001, to hold that trial court factual findings should not be disturbed. However, just because the Court of Appeals erroneously reversed a trial court's grant of a new trial in *Tyner* does not mean that every single trial court decision should be affirmed. Indeed, the U.S. Supreme Court has made clear that "deference does not imply abandonment or abdication of judicial review." *Miller-El v Cockrell*, 537 US 322, 340; 123 S Ct 1029; 154 L Ed 2d 931 (2003).

Importantly, *McSwain* makes clear that trial judges get less deference than juries. *McSwain*, 259 Mich App at 682-83. And, to the extent that trial judges get deference, such deference is based on an underlying principle, expressed in a concurrence from this Court that was cited in both *Tyner* and the decision below. In *Alder v Flint City Coach Lines*, Justice Leland

Carr stated that trial judges get deference because they are able to note the attitude of the jury as to various matters that come at the trial. 364 Mich 29, 38; 110 NW2d 606 (1961) (Carr, J., *concurring*). **But that reason for the rule does not apply in this case.** Judge Callahan did not preside over the trial in either Mr. Scott's or Mr. Johnson's cases: to make his decisions about what may have been important at trial and how the new evidence would affect the case at retrial, he must rely on the trial transcripts, just like an appellate court would.[6]

Finally, deference is only applicable when the trial court makes findings on issues that actually warrant deference. Had Judge Callahan commented on Skinner's demeanor or body language, for example, those findings would warrant deference. But he made no such findings. Instead, the three issues that Judge Callahan evaluated that the Court of Appeals upheld as reasonable bases for his decision were:

1. How good would someone's memory be about an event he witnessed 16 years earlier?
2. How reasonable is the idea that a car's dome light can illuminate someone standing outside the car, especially given the cases cited in footnote 5 above?
3. How likely is it that a person with a perjury conviction will lie again?

These issues have something in common: they all turn on analysis of case law, psychological research or internal beliefs. **They have nothing to do with those factors that are inherently the province of the trial court (body language, demeanor, etc.).** This Court is just as capable of evaluating the merits of such questions as Judge Callahan was.

Deference is an important principle, but in this case, the Court of Appeals merely used it as an excuse. By any standard, the trial court's findings pertaining to Skinner were clear error, and it abused its discretion in denying relief from judgment.

[6] *See also Grissom*, 492 Mich at 322-23, 324 n.2 (Kelly, J., concurring) (noting that since original trial judge had retired, this Court was as qualified to make credibility determinations as the new trial judge would be).

C. Aside From The Inculpatory Evidence From Trial And The New Eyewitness Account Of Skinner, There Is Other Relevant Evidence In The Record, And The Court Below Clearly Erred In Failing To Consider This Evidence As Part Of The *Cress* Materiality Inquiry.

The holistic materiality review under the *Cress* standard makes sense because the *Cress* inquiry is about what the evidence would be at a hypothetical retrial. The Florida Supreme Court, addressing that state's similar new evidence standard, recently articulated this point well:

> [T]he postconviction court must consider the effect of the newly discovered evidence, in addition to **all of the admissible evidence that could be introduced at a new trial**. In determining the impact of the newly discovered evidence, the court must conduct a cumulative analysis of all the evidence so that there is a total picture of the case and all the circumstances of the case.

Hildwin v State, 141 So 3d 1178, 1184 (Fla 2014) (citations omitted) (emphasis added).

Skinner's account and the weaknesses in the original evidence at trial are themselves enough to establish materiality under *Cress*. But under the logic of a holistic materiality inquiry, other evidence in the record—aside from the original trial testimony and the new account of CJ Skinner—that would be available upon retrial should be considered as well. In the case at bar, the new evidence other than Skinner's account consists of two things: the recantations of both prosecution witnesses, and the domestic violence records implicating the victim's husband.

Because Mr. Johnson presented the recantations and the domestic violence records in a prior motion for relief from judgment, those are not freestanding new evidence claims for him. Mr. Scott, however, never filed a prior motion, so the recantations and domestic violence records do constitute separate *Cress* claims for him. Nevertheless, when evaluating the materiality of Skinner's new eyewitness account, the Court must consider the domestic violence records and recantations for both Mr. Johnson and Mr. Scott, albeit for slightly different reasons.

For Mr. Scott, the materiality of all of the new *Cress* evidence (Skinner's account, the domestic violence records, and the recantations) should be considered collectively. This makes

sense because it would be in line with this Court's directive in *Grissom*, where this Court told the trial court to collectively weigh the several pieces of new impeachment evidence.

For Mr. Johnson, even though the domestic violence records and recantations are not live ***claims*** on this particular motion, they are important ***facts*** that must be considered in the *Cress* inquiry. The logic of the holistic *Cress* materiality evaluation is based on the obvious utility of weighing all the evidence in the record that could be presented upon retrial. It should make no difference that one co-defendant presented the evidence in a prior *pro se* motion where no evidentiary hearing was granted, and the other co-defendant raised the same evidence in a more comprehensive motion where he had the assistance of counsel.

As long as the evidence was within the scope of the remand and would be admissible upon retrial, it must be considered as part of the *Cress* inquiry. That the domestic violence records and the recantations were within the scope of the remand is established in Argument II. And that those items would be admissible upon retrial is clear. Burnette would be available to testify to his recantation under oath, as he did at the evidentiary hearing. Jackson is dead but if his original inculpatory testimony were introduced on retrial, his recantation would be admissible under MRE 804(B)(3). Indeed, Mr. Scott and Mr. Johnson have a constitutional right under the Confrontation Clause to have Jackson's recantation admitted. *Blackston v Rapelje*, 780 F3d 340, 353-54 (CA 6), *cert den* 136 S Ct 388; 193 L Ed 2d 449 (2015).

The history of domestic violence would be admissible at trial as well. First, when a domestic violence victim is killed, prior domestic violence records are generally admissible because they go to motive. *E.g. People v Ortiz*, 249 Mich App 297; 627 NW2d 417 (2001). Next, the prior domestic violence is material impeachment evidence, and would be admissible because it relates to the motives, biases and credibility of Will Kindred, a testifying fact witness. *Davis v Alaska*, 415 US 308, 316-17; 94 S Ct 1105; 39 L Ed 2d 347 (1974) (party has right to "cross-

examination directed toward revealing possible biases, prejudices, or ulterior motives of the witness as they may relate directly to issues or personalities in the case at hand. . . .").

Finally, a defendant always has a due process right to introduce relevant evidence of third party guilt. *See Holmes v South Carolina*, 547 US 319; 126 S Ct 1727; 164 L Ed 2d 503 (2006). In this case, the history of domestic violence calls into question Will Kindred's credibility and is highly probative, suggesting that he should have been a likely suspect. Such proof is crucial to present to a jury and would create reasonable doubt as to the defendants' guilt, either on its own or in conjunction with the other new and old evidence addressed here.

D. The Error The Court Of Appeals Made In This Case, Evaluating *Cress* Materiality In A Vacuum Instead Of In Proper Context, Is Not Limited To Just This Case: It Is A Systemic Misunderstanding This Court Should Correct.

The Court of Appeals's misapplication of the fourth prong of *Cress* is not unique to this case. There are many other cases where lower courts have conducted the same type of incomplete materiality analysis contrary to *Cress* and *Grissom*. For example:

- *People v Garcia*, No. 309081, 2014 WL 1267269 (Mich Ct App March 27, 2014). The defendant proffered four pieces of new evidence. In its analysis, the Court of Appeals evaluated the materiality of the four pieces of new evidence separately and denied relief.

- *People v Anderson*, No. 311448, 2014 WL 1383399 (Mich Ct App April 8, 2014). The defendant contended that a message posted to a Twitter account, allegedly belonging to the victim, constituted newly discovered evidence that the victim committed perjury in her trial testimony. The Court of Appeals dismissed the message as immaterial, but in doing so never evaluated the materiality of the new evidence in light of the old.

To be sure, the Court of Appeals does not get the *Cress* materiality standard wrong in every case. There are cases where it has applied the correct analysis. *See e.g. People v Buck*, No. 300702, 2012 WL 2126061 (Mich Ct App June 12, 2012); *People v George*, No. 288032, 2010 WL 1779898 (Mich Ct App May 4, 2010). This fact serves to further highlight the need for this Court to grant leave of appeal and clarify that the proper way of evaluating materiality for *Cress*

purposes is a holistic analysis weighing *all* of the evidence, old and new.[7]

II. The Court Of Appeals Clearly Erred In Determining That The Scope Of The Remand Was Limited To Skinner's Account, And Thus Clearly Erred In Denying Relief Even Though The Trial Court Had Found That The Record Of This Case Cannot Support Attempted Robbery/Felony Murder—The Only Theory Ever Presented To The Factfinder At Trial.

A. The Only Way To Harmonize The Full Text Of This Court's Remand Orders In Mr. Scott's And Mr. Johnson's Cases Is To Conclude That The Remand Covers The Recantations And The Domestic Violence Records In Addition To Skinner.

This Court's simultaneous Remand Orders in the cases of Mr. Scott and Mr. Johnson, read as a whole, only make sense if they are read to include the domestic violence records and recantations. In Mr. Johnson's Remand Order, this Court added language that refers to Mr. Scott's case, and is helpful for determining the scope of the hearing on remand:

> . . . (4) if the court determines that the defendant is not entitled to relief, but that the defendant in *People v Kendrick Scott* (Docket No. 148324) is entitled to relief, the Court of Appeals shall determine whether the defendant would have been entitled to relief but for MCR 6.508(D)(2), and, if so, whether, in the court's judgment, the denial of such relief in that circumstance violates the defendant's constitutional right to due process under either the federal or state constitutions.

Johnson Remand Order, Appendix B. That fourth remand issue makes clear that there are certain issues to be considered on remand that were never previously presented by Mr. Scott (given that this is his first motion for relief from judgment), but *were* presented in a prior motion by Mr. Johnson (therefore implicating MCR 6.508(D)(2)). The *only* such issues are the recantations of the State's only two inculpatory witnesses and the newly discovered domestic violence records. Those two issues must fall within the scope of the remand, or else that fourth part of this Court's order in Mr. Johnson's case would be superfluous.

The language of the fourth part of the Remand Order is thus relevant to the proper

[7] All four unpublished cases on this page are included in Appendix I and are cited, not for propositions of law, but as examples of how the Court of Appeals's analysis of the fourth *Cress* prong has varied and frequently deviated from *Cress* and *Grissom*. MCR 7.215(C)(1).

reading of the second part of the Order ("whether the defendant is entitled to a new trial on grounds of newly discovered evidence in light of the proposed evidence related to Charmous Skinner, Jr., as an eyewitness to the homicide"). This issue encompasses not just Skinner's own newly discovered account, but also the other new evidence claims raised by Mr. Scott (recantations and domestic violence records). This Court wrote that the issue was "whether the defendant is entitled to a new trial *on grounds of newly discovered evidence* *in light of* the proposed evidence related to Charmous Skinner, Jr., as an eyewitness to the homicide." *Id.* (emphasis added). This language is properly read to mean that the lower court was to evaluate *all* of the newly discovered evidence claims *in light of* Skinner's testimony. In other words, all of the newly discovered evidence claims are to be evaluated, and their weight must be judged "in light of" the new account of Skinner.

This reading of the Remand Orders is not only reasonable, but it is necessary, because it is the only reading that does not render parts of the orders to be surplusage. *See Smith v Michigan Employment Sec Comm*, 410 Mich 231, 250; 301 NW2d 285 (1981).[8]

B. With The Scope Of The Remand Properly Understood, The Trial Court Correctly Admitted The Domestic Violence Records, And Its Finding That The Attempted Robbery/Felony Murder Theory Can No Longer Be Supported Warrants Relief.

Relying on the domestic violence records in addition to the account of Skinner and the many credibility issues present in Will Kindred's original trial testimony, Judge Callahan found that the evidence in the record of this case does not support an attempted robbery/felony murder theory. Because that was the only theory that was presented to the factfinder at trial, Judge Callahan abused his discretion in denying relief from judgment.

[8] As for this Court's final words in the Remand Orders—"[i]n all other respects, leave to appeal is denied. . ."—that language refers to the claims not based on ineffective assistance of counsel (covered under issues 1 and 3 of the remand) or newly discovered evidence (issue 2 of the remand). Thus, it appears that the *Brady* claim falls outside the scope of the remand. The defense therefore did not present evidence on this claim at the evidentiary hearing.

1. As Judge Callahan found, the newly discovered evidence convincingly discredits the robbery theory necessary for meeting the enumerated felony requirement of felony murder.

The felony murder statute requires that a defendant be guilty of murder committed in the perpetration an enumerated felony. MCL 750.316(1)(b). The statute's reference to robbery includes assault with intent to rob while armed. *People v Akins*, 259 Mich App 545, 553; 675 NW2d 863 (2003). Assault with intent to rob while armed was the only predicate underlying offense that the prosecution sought to prove at trial. Tr. 5/31/00 at 13.

The prosecutor repeatedly argued at trial that the death of Ms. Kindred was the result of a robbery gone bad, with the prosecution noting that "I don't suggest to you that either [defendant] actually intended to kill Lisa Kindred. I don't suggest that at all." Tr. 6/1/00 at 36. The prosecutor thus affirmatively eschewed any theory of premeditated murder and relied only on felony murder involving an attempted robbery. *See also* Tr. 5/31/00 at 13 ("[T]his is a felony murder case. This is a case about a robbery or attempted robbery.")

Following the evidentiary hearing, Judge Callahan stated: "**So, could the killing of Lisa Kindred have been a robbery gone bad or a kidnapping gone bad? Not in my opinion."** EH 8/7/15 at 16 (emphasis added). Instead, contrary to the prosecution's theory at trial, Judge Callahan said the murder was likely the result of a planned hit set up by her husband, and Mr. Scott and Mr. Johnson "may very well have been co-conspirators in this murder plot." *Id.*

Thus, Judge Callahan's finding after the 2015 hearing—that Ms. Kindred's death was not the result of a robbery gone bad, but instead was likely a planned hit arranged by the victim's husband—is inconsistent with the basis for Mr. Scott's conviction. Simply put, Mr. Scott's felony murder conviction cannot be sustained upon retrial unless the prosecution proves a specific intent to rob. *People v Cotton*, 191 Mich App 377, 391; 478 NW2d 681 (1991); *People v Saxton*, 118 Mich App 681, 689-92; 325 NW2d 795 (1982) (felony murder cannot be proved

without proving each element of underlying felony). Judge Callahan made clear that he does not believe such intent to rob could be proved upon retrial. EH 8/7/15 at 16. He elaborated for several pages about the suspicious conduct of Will Kindred. In that discussion, he noted that the Roseville domestic violence records and the testimony of Skinner establish that Mr. Kindred "had a very violent personality . . . [and] my overall impression in regard to those records and Mr. William Kindred is . . . that it's quite conceivable that he may have planned or contracted to have this killing take place." EH 8/7/15 at 14-15. Judge Callahan further elaborated on how suspicious it is for a man to leave his wife and young children (including a newborn) alone in the car in the middle of the night in a neighborhood as dangerous as this one. *Id.* at 15-16.

Indeed, Judge Callahan made clear that he did not find Mr. Kindred's trial testimony credible: "Why would he do that? Supposedly to negotiate over the potential purchase of a motorcycle. **It's difficult for me to accept that explanation**." *Id.* at 16 (emphasis added). Finally, Judge Callahan also found it significant that Ms. Kindred was killed with a .22 caliber firearm, the same caliber as firearms confiscated from Mr. Kindred on two separate occasions. *See id.* at 19 and Unredacted Domestic Violence Records at 8, 12; Ex. 1 at Hearing; Appendix D.

In light of these findings, Judge Callahan made clear that he deemed the robbery theory implausible: **"So, could the killing of Lisa Kindred have been a robbery gone bad or a kidnapping gone bad? Not in my opinion."** EH 8/7/15 at 16 (emphasis added).

2. Having been convinced that the evidence presented at the hearing defeats the robbery theory, Judge Callahan abused his discretion in denying the motion for relief from judgment.

Judge Callahan's conclusion that the robbery theory is defeated by the new evidence is reasonable: It is supported by the new evidence presented at the evidentiary hearing on remand, including the testimony of Skinner, and the domestic violence records. However, Judge Callahan's subsequent failure to grant relief from judgment was an abuse of discretion.

Besides robbery, no enumerated felony in MCL 750.316(1)(b) is applicable to this case, and the prosecution never relied on any other theory. Therefore, the trial court's conclusion that there is no reasonable probability of a different outcome upon retrial, despite its finding that the robbery theory is not credible, is a legally incorrect ruling, because a conviction for felony murder is impossible if the underlying felony cannot be proved. *Saxton*, 118 Mich App at 689-92. **Such a legally incorrect ruling is *per se* abuse of discretion**. *Grissom*, 492 Mich at 321 (2012).

The trial court's conclusion that relief should be denied because this *might* have been a premeditated killing in which Mr. Scott and Mr. Johnson conspired with the victim's husband was also an abuse of discretion. This alternate theory of premeditated murder was never presented to the jury and **was affirmatively dismissed by the prosecution at trial**. *E.g.* Tr. 1/10/00 at 8-9. Furthermore, there was never any evidence at any point in this case to support a finding that the victim's husband might have conspired with either Mr. Scott or Mr. Johnson.

And in any case, if Mr. Scott and Mr. Johnson are to be deemed guilty of premeditated murder as opposed to felony murder, the elements of premeditated murder must be proved beyond a reasonable doubt to a jury upon retrial.

C. In Sustaining Mr. Scott's and Mr. Johnson's Convictions Despite Finding That The Elements Of The Charged Offense Cannot Be Satisfied, Judge Callahan Violated Their Rights Under The Due Process Clause.

Aside from being a legal error constituting abuse of discretion, *Grissom*, 492 Mich at 321, Judge Callahan's failure to grant relief, even while finding that the elements of the charged offense cannot be proved beyond a reasonable doubt, also constitutes a violation of Mr. Scott's and Mr. Johnson's rights under the Due Process Clause to the Fourteenth Amendment. *In re Winship*, 397 US 358, 364; 90 S Ct 1068; 25 L Ed 2d 368 (1970) ("[W]e explicitly hold that the Due Process Clause protects the accused against conviction except upon proof beyond a

reasonable doubt of every fact necessary to constitute the crime with which he is charged.").

Where, as in this case, new evidence presented indicates that guilt for the charged offense could no longer be sustained beyond a reasonable doubt, failure to grant a new trial is a violation of the Due Process Clause. *See United States v Gaudin*, 515 US 506, 510; 115 S Ct 2310; 132 L Ed 2d 444 (1995) (noting importance of "[t]he right to have a jury make the ultimate determination of guilt"). **Due process violations can occur even where the evidence may have been sufficient to convict at trial, but subsequently comes to be repudiated.** *See Han Tak Lee v Glunt*, 667 F 3d 397, 407-08 (CA 3 2012) (relief warranted on due process grounds where new experts at post-conviction hearing show that the State's expert testimony at trial was fundamentally unreliable); *Ex Parte Henderson*, 384 SW3d 833 (Tex Crim App 2012).

The point is simple: Mr. Scott and Mr. Johnson were neither charged with nor convicted of premeditated first-degree murder, and no evidence was presented that they were part of a conspiracy to murder the victim. The prosecutor affirmatively argued the opposite at trial, stating that the murder was an unforeseen consequence of an attempted robbery.

Thus, it was an abuse of discretion, and a violation of Mr. Scott's and Mr. Johnson's Due Process rights, to summarily convict them of this alternate offense, never presented to a jury, in order to deny relief from judgment and a new trial. Given Judge Callahan's own findings of fact on this issue, the only reasonable outcome is a new trial—where the prosecution can attempt to convict Mr. Scott and Mr. Johnson of premeditated murder, should it so choose, by proving the elements of that offense to a jury beyond a reasonable doubt, as our Constitution requires.

D. Even If This Court Concludes That The Recantations And Domestic Violence Records Were Not Within The Scope Of The Remand, It Can And Should Now Expand The Scope Of Its Review To Cover Those Two Categories Of Evidence.

Even if this Court is unconvinced that the scope of its original remand was broad enough to include the domestic violence records and the recantations, it can and should now broaden the

scope of its review to include those two categories of evidence.

This Court has the authority to broaden the scope of its review under MCR 7.316(A)(3) (allowing "reasons or grounds of appeal to be amended or new grounds to be added") and MCR 7.316(A)(7) (allowing the entry of "any judgment or order that ought to have been entered, and also permitting "further orders and . . . relief as the case may require"). In this instance there is much to be gained by broadening the scope of review, and no additional cost in terms of judicial resources. Because the trial court already allowed a record to be built on the recantations and the domestic violence records, and indeed already made findings based on that evidence, no further remand or hearings would be required. Yet, by considering the domestic violence records and the recantations, this Court would be in a better position to ensure a just outcome in this significant case. Therefore, if it deems its prior remand order not broad enough, this Court should now broaden its review to include the domestic violence records and the recantations.

III. The Court Of Appeals Clearly Erred In Holding That Trial And Appellate Counsel's Failure To Even Attempt To Locate And Interview A Known Eyewitness Does Not Constitute Deficient Performance Under The *Strickland* Standard.

The Sixth and Fourteenth Amendments guarantee a defendant the effective assistance of both trial counsel and appellate counsel on direct appeal of right. *Strickland v Washington*, 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984); *Evitts v Lucey*, 469 US 387, 395-97; 105 S Ct 830; 83 L Ed 2d 821 (1985). Ineffective assistance of appellate counsel is judged on the same standard as that of trial counsel. *People v Reed*, 449 Mich 375, 382; 535 NW2d 496 (1995).

To establish ineffectiveness, a defendant must demonstrate that counsel's performance fell below an objective standard of reasonableness and that the representation so prejudiced the defendant as to deprive him of a fair trial. *Strickland*, 466 US at 669. Failure to investigate and present exculpatory evidence renders representation ineffective. *See Wiggins v Smith*, 539 US

510; 123 S Ct 2527; 156 L Ed 2d 471 (2003). This Court has found trial counsel's conduct to be deficient where he failed to call eyewitnesses to a murder, a decision that the Court found could not be justified as trial strategy. *People v Johnson*, 451 Mich 115, 122; 545 NW2d 637 (1996).

The Court of Appeals clearly erred in denying the ineffective assistance claim, pled in the alternative to the *Cress* claim. Because the materiality of Skinner's account is clear (as fully explained in the *Cress* discussion above) the question of whether relief is warranted comes down to diligence by trial counsel. The only two possibilities are:

1) Skinner's eyewitness account *could not* have been obtained through reasonable diligence at trial, and relief is warranted under the *Cress* standard discussed above; or

2) Skinner's account *could* have been discovered through reasonable diligence at trial, and relief is warranted under the *Strickland* standard.

The Court of Appeals based its decision on its conclusion that Skinner had moved out of state and was refusing to talk to "anyone" about what he saw. Majority Opinion at 8. There are two flaws in the Court of Appeals holding. First, the court misrepresented what Skinner actually said. Skinner had not "refused to talk to anyone," Opinion at 8, but rather he indicated that his family did not ask him about what he may have seen, EH 5/15/15 at 16, something Dr. Rosenblum deemed common and unremarkable, EH 5/27/15 at 9-10. Indeed, Skinner made clear that he has always been interested in catching his mother's killer, and would have cooperated with the investigation if approached. EH 5/15/15 at 16-17, 20, 25.

The second flaw in the Court of Appeals decision is that it again answers the wrong question. The Court of Appeals should have addressed whether a reasonable attorney should have *sought to interview* a witness that the police reports told him had been in the car during the shooting. At the time they would have been making that decision, the attorneys would not have known that Skinner had moved away or might not want to talk about the events, and the Court of Appeals clearly erred in letting hindsight bias affect its inquiry into what a reasonable attorney at

the time of trial should have done. The attorneys had a duty to conduct a reasonable investigation, *Strickland*, 466 US at 691, which involves exploring "all substantial defenses." *People v Chapo*, 283 Mich App 360, 371; 770 NW2d 68 (2009). By their own admission, Mr. Scott's and Mr. Johnson's attorneys did not do that, and thus they performed deficiently.

The trial court was even further adrift in its own ruling on the ineffective assistance claim. First, Judge Callahan indicated that counsel were provided with "records" indicating that Skinner "didn't want to talk to anybody or he was too emotionally upset at that time to have spoken to anyone." EH 8/7/15 at 22. **But no such records actually exist**, and the prosecution has never argued that they do. Skinner made clear that he was never asked about what he saw by police or any attorneys. EH 05/15/15 at 16–17. There is no way for any attorney to have learned that Skinner "didn't want to talk to anybody or he was too emotionally upset."

Second, Judge Callahan noted that trial counsel "would have had to have jumped through a tremendous amount of hoops" "to get the expense to go all the way out to Philadelphia even to speak to this young man." EH 8/7/15 at 23. In making that finding, Judge Callahan noted that both Mr. Scott and Mr. Johnson had appointed counsel, as if to suggest appointed attorneys have some lesser duty to investigate on behalf of their clients. Even aside from the fact that counsel could have sought to speak with Skinner on the phone, the trial court's reasoning is contrary to established precedent about an attorney's duty to investigate. All attorneys, appointed or retained, have a constitutional "duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." *Strickland*, 466 US at 691.

If relief is not granted under the *Cress* claim, then trial and appellate counsel's failure to even seek to interview Skinner would be deficient performance. *See People v Trakhtenberg*, 493 Mich 38 at 55 n.10; 826 NW2d 136 (2012). And the prejudice prong of *Strickland* is also satisfied—for the same reasons discussed in the *Cress* materiality discussion above, given that

the two standards are nearly identical. *Strickland*, 466 US at 694 and *Tyner*, 497 Mich at 1001.

Therefore, the Court of Appeals clearly erred in denying relief on the alternate ineffective assistance claim, after having also denied relief on the *Cress* claim.

IV. Even If This Court Finds That Mr. Scott Is Not Entitled To Relief Under *Cress* Or *Strickland*, This Court Should Still Grant Relief Under MCR 7.316(A)(7), MCL 770.1, And/Or A Freestanding Actual Innocence Standard.

Mr. Scott and Mr. Johnson have been exculpated by the victim's own son, who was sitting inches away from the victim when she was shot. In a case where there were no other eyewitnesses, and the inculpatory testimony from trial has been recanted and shown to be largely impossible, a new exculpatory eyewitness such as Skinner makes for a strong showing of actual innocence. Coupling Skinner's significant eyewitness account with what is now known about the victim's husband—facts that convinced even Judge Callahan that the husband was likely involved in the murder—provides even further indication that Mr. Scott and Mr. Johnson are innocent and have been incarcerated for 16 years for crimes they did not commit.

On at least two prior occasions, this Court has expressed interest in addressing the question of whether defendants may be entitled to relief on the basis of actual innocence, even where other legal claims may not succeed. *See People v Garrett*, 493 Mich 949; 828 NW2d 26 (2013) and *People v Swain*, -- Mich --; 869 NW2d 618 (2015). While the Court was ultimately unable to address the question of actual innocence as a legal standard in those cases, Mr. Scott's and Mr. Johnson's cases present the perfect opportunity to decide the standard for relief under MCL 770.1, MCR 7.316(A)(7) and/or a freestanding actual innocence standard.

A. MCR 7.316(A)(7)

MCR 7.316(A)(7) gives this Court the power to "enter any judgment or order that ought to have been entered, and enter other and further orders and grant relief as the case may require."

Given that Mr. Scott and Mr. Johnson have been denied new trials despite overwhelming evidence of actual innocence—despite the fact that the only theory by which they were convicted (felony murder) was repudiated by the trial court below—this Court should exercise its authority under MCR 7.316(A)(7) and enter the new trial judgment "that ought to have been entered" by the trial court, once it concluded that the felony murder theory could not be sustained.

B. MCL 770.1

MCL 770.1 states that a new trial may be granted "**when it appears to the court that justice has not been done**" (emphasis added). For the reasons stated fully above, justice has not been done in this case. The Court should either grant leave to lay out the standard for relief under MCL 770.1, or simply order a new trial under MCL 770.1. To the extent the statute applies only to trial courts, this Court may nevertheless order a trial under MCL 770.1 through its power to "enter any judgment or order that ought to have been entered." MCR 7.316(A)(7).

C. *Herrera v Collins*: Freestanding Actual Innocence Under U.S. Constitution

This Court should grant leave to recognize a freestanding actual innocence constitutional claim based on *Herrera v Collins*, 506 US 390; 113 S Ct 853; 122 L Ed 2d 203 (1993), as many sister states have done. *Herrera* strongly suggested that a freestanding actual innocence claim might warrant relief. 506 US at 398. At least three states, California, Connecticut, and Texas, have recognized freestanding actual innocence claims under the federal constitution based on the language in *Herrera*, while several other states, including Illinois, New Mexico, and New York have relied on *Herrera*'s reasoning in recognizing the decision to recognize freestanding actual innocence claims under their own state constitutions.[9]

[9] *In re Clark*, 855 P2d 729, 760 (Cal 1993); *Miller v Comm'r of Correction*, 700 A 2d 1108, 1130-31 (Conn 1997); *People v Washington*, 665 NE2d 1330, 1336-37 (Ill 1996); *State ex rel Amrine v Roper*, 102 SW3d 541, 546 n. 3 (Mo 2003); *Montoya v Ulibarri*, 163 P3d 476, 483-

Because Mr. Scott and Mr. Johnson can satisfy whatever threshold showing this Court may find *Herrera* requires, this case presents the perfect opportunity for this Court to recognize the existence of a freestanding claim of actual innocence in Michigan.

D. Michigan Constitution

Mr. Scott and Mr. Johnson should be entitled to relief based on a freestanding innocence claim under the Michigan Constitution. Several states—including California, Connecticut, Illinois, Missouri, New Mexico, New York and Texas—recognize freestanding actual innocence claims under their state constitutions.*See* n.9, *supra*.

This Court's precedent already indicates a willingness, in some circumstances, to grant necessary constitutional protections that the U.S. Supreme Court may not yet have explicated. *People v Bullock*, 440 Mich 15, 30; 485 NW2d 866 (1992). Indeed, the so-called "freestanding" actual innocence claim is based in part in the "cruel and unusual punishment" clause of the federal Constitution. *Herrera*, 506 US at 398. Michigan's Constitution includes more expansive wording in its corresponding section ("cruel **or** unusual,**"** emphasis added), and thus a more expansive reading of the State constitution's clause makes perfect sense. Because Mr. Scott and Mr. Johnson are factually innocent, as described above, they should be granted relief under the Michigan Constitution.

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84 (NM 2007); *People v Cole*, 1 Misc 3d 531, 541 (NY 2003); *State ex rel Holmes v Honorable Court of Appeals for Third Dist.*, 885 SW2d 389, 397 (Tex Crim App 1994).

CONCLUSION AND RELIEF REQUESTED

For the reasons stated above, Mr. Scott respectfully requests that this Court either summarily reverse the decisions below and order relief from judgment and a new trial or grant this application for leave to appeal.

Respectfully Submitted,

MICHIGAN INNOCENCE CLINIC

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